OSMAN EFFENDI MAHMUD & ANOR

v.

MOHD NOH KHAMIS

HIGH COURT MALAYA, ALOR SETAR
KN SEGARA J
[CIVIL APPEAL NO: 12-5-98]
21 MAY 1998

DAMAGES: *Action for - Loss of future earnings - Proof of good health - Civil Law Act 1956, s. 28A(2)(c)(i) - Refusal to award damages for loss of future earnings - Whether trial judge erred in law - Whether had imposed unduly heavy burden on plaintiff to prove good health*

TORT: *Negligence - Road accident - Liability, assessment of - Trial judge apportioning liability at 50%:50% - Whether trial judge had considered all relevant evidence - Whether there was misdirection - Whether defendant 100% liable*

In this case, a motorcycle ridden by the first plaintiff (with the second plaintiff riding pillion) had collided with a motorlorry driven by the defendant. Before the learned Sessions Judge two conflicting versions were given by the parties as to the manner the accident happened. The learned judge, after having considered *inter alia* the position of the tyres of the motorcyle after the impact, accepted the defendant's version and consequently assessed liability at 50:50. The learned judge, however, refused to award damages to the first plaintiff for loss of future earnings, on the ground that the latter did not prove that he was in good health before the accident. The plaintiffs appealed against the decision, and the issues that arose were: (1) whether the Sessions Judge had misdirected herself in law and fact when she assessed the defendant's liability at 50%; (2) whether, bearing in mind the purport of s. 28A(2)(c)(i) Civil Law Act 1956, the Sessions Judge had erred in not making an award for damages for loss of future earnings.

Held:

[1] Since the blood spot "J" on the sketch plan is very close to the left edge of the road, it strongly suggests not only that the plaintiffs had fallen off their motorcycle at about that spot, upon colliding with the motorlorry, but also that the motorlorry was very close to the left edge of the road and on the correct side of the motorcycle, at the time of impact. And, as there were no broken pieces of glass, brake marks or scratch marks on the road, the proper inference as to where the impact occurred must be drawn from the position of the blood spot "J", and not from the position of the tyres of the motorcycle.

[2] The learned Sessions Court judge had failed to give any consideration to the blood spot found at "J" on the sketch plan. If she had considered the blood spot, which was found completely along the line of travel of the first plaintiff, and the defendant's admission that he might have encroached onto the plaintiff's path, the learned judge would have come to the conclusion that the defendant was 100% liable. Clearly, thus, the learned judge had not evaluated all the evidence before her and had misdirected herself in law and in fact when making a finding that the defendant was only 50% to blame for the accident. On the evidence, the first plaintiff's version as to how the accident happened ought to be accepted and the defendant's liability should be assessed at 100%.

[3] Where it had been established that the plaintiff had been gainfully employed immediately before the accident, there was a presumption that he was in good health and his claim for the loss of future earnings was directly attributable to the injuries sustained from the accident and no other cause of ill health prior to the accident.

[3a] There was no suggestion in this case that the first plaintiff was suffering from any ill-health before the accident, and that being so it must be deemed to be admitted that the plaintiff was in good health but for the injuries. The Sessions Judge therefore had wrongly invoked s. 28A(2)(c)(i) of the Civil Law Act 1956, and had imposed an unduly high burden of proof of good health on the plaintiff to qualify for an award in damages for loss of earnings.

[Appeal allowed; defendant held 100% liable and damages for loss of future earnings assessed at RM1,125 x 12 x 16]

Case(s) referred to:
Abdul Rahman v. Soon Ah Hai [1978] 2 MLJ 31 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c)(i)

For the appellant - Teresita Antoinette; M/s NM Tiong & Co
For the respondent - Tina Harjit Singh; M/s Malek & Assoc

Reported by WA Sharif

JUDGMENT

KN Segara J:

The 1st plaintiff is the rider of m/cycle PAB 8322 and the 2nd plaintiff, his pillion rider. The defendant is the driver of m/lorry KP 8555. The plaintiffs are appealing against the decision of the learned Sessions Court judge on both liability and quantum (damages for loss of future earnings of the 1st plaintiff). Liability was assessed against the 1st plaintiff and the defendant at 50:50 by the Sessions Court judge. She did not make an award in damages for the loss of future earnings of the 1st plaintiff on the ground the 1st plaintiff did not prove he was in good health before the accident (although she assessed the multiplicand for such an award at RM1,125 per month and the number of years purchase at 16 for the multiplier).

On 15 November 1991 at about 2pm, a collision occurred between m/cycle PAE 8322 and m/lorry KP 8555 in the vicinity of a sharp bend when the 1st plaintiff was riding his m/cycle from the direction of Kampung Baru Sungei Tiang while the defendant was driving his m/lorry in the opposite direction, coming from Bukit Perak (see sketch-plan at p. 65, Record of Appeal). As is common in all accident cases, there were two versions as to how the accident happened at the hearing before the Sessions Court judge – that is, the version of the plaintiffs and the version of the defendant. The Sessions Court Judge seems to have preferred the version of the defendant and because the 1st plaintiff's m/cycle was shown on the sketch plan to be lying near the middle of the road, and abutting on the defendant's correct side of the road, she seems to have further concluded that the impact was very near the centre of the road.

Therefore, relying on the authority of *Abdul Rahman v. Soon Ah Hai* [1978] 2 MLJ 31, she apportioned liability equally.

The 1st plaintiff's version was as follows. In examination-in-chief, he testified:

(page 25 Record of Appeal)

> ... Kemalangan berlaku di tengah-tengah selekoh. Kemalangan dengan m/lori. Apabila sampai di selekoh tiba-tiba satu motor lori muncul. Saya tidak dapat buat apa-apa kerana lori telah masuk ke jalan saya. Saya jatuh pengsan ... Lori ini besar. Saya tidak nampaknya sebelum ia muncul sebab selekoh tajam. Masa saya nampaknya motor lebih kurang 25 kaki dari saya. Lepas itu saya dimasukkan ke Hospital Besar, Alor Setar.

Under cross-examination he testified:

(page 27 Record of Appeal)

> Kemalangan adalah dengan lori yang datang dari arah Bukit Perak Kg. Baru. Saya nampak 1 buah motor lori muncul dengan tiba-tiba. Masa kejadian saya ada cuba mengelak ke kiri jalan. Dalam repot saya ada kata bila lori muncul. Saya tidak dapat buat apa-apa. Maksud tidak dapat buat apa-apa ialah tidak dapat elak kemalangan, tidak brek. Saya langgar motor lori itu. Tidak betul bahawa masa kemalangan saya tunggang di tengah-tengah jalan. Tidak betul saya tunggang dengan laju dan tidak beri perhatian di hadapan. Tidak betul bahawa saya masuk di jalan motor lori. Motor lori masuk ke bahagian jalan saya. Bahagian depan lori tidak langgar saya. Tidak betul bahawa saya masuk ke laluan lori dan langgar lori.

The pillion rider, the 2nd plaintiff (SP4), corroborated the 1st plaintiff to the extent that the 1st plaintiff was on his correct side of the road and that the defendant's lorry had encroached onto the 1st plaintiff's path. He testified, *inter alia,* under examination-in-chief: (page 30 Record of Appeal)

> Setahu saya lori ada di hadapan saya. Semasa kemalangan berlaku, lori ada di jalan saya. ... motor yang saya tumpang ada di sebelah kiri jalan.

and under cross-examination:

> ... Saya tidak setuju bahawa sebelum kemalangan motor kami masuk ke jalan lori.

The plaintiffs were not shaken in cross-examination that the 1st plaintiff was on his correct side of the road and that the m/lorry had in fact encroached on to their path.

The investigation officer (SP1) testified: (page 22 Record of Appeal)

> Tempat kejadian adalah jalan selekoh. Selekoh ini adalah tajam. Selain dari motor tidak ada motor lori di tempat kejadian. Di tempat kejadian tidak ada tanda brek, tanda calar dan kaca. Saya siasat kerosakan kedua-dua kenderaan. Kerosakan motor lori adalah di tangki minyak sebelah kanan. Itu sahaja di bahagian badan lori sebelah kanan berhampiran tayar belakang. Kerosakan motosikal:
>
> Tayar hadapan rim bengkok – tayar dengan
> kong motosikal bengkok.
> Lampu signal kanan pecah.
> Mudguard penghalang angin pecah.
> Satu pemijak bahagian belakang patah.
> Kerosakan motosikal semuanya bahagian hadapan
> kanan.
> "J" adalah kesan darah. ...

Since the damage to the m/lorry was to the petrol tank, below its body at the rear right side, close to the back right tyre and the damage to the m/cycle was largely to its front, it cannot be seriously disputed that the collision was in fact between the front portion of the m/cycle and the rear right portion of the lorry, nearer to the back wheel where the petrol tank is located, under the body of the m/lorry. This kind of impact could only have taken place in a situation where the right rear portion of the lorry was in the path of the on-coming m/cycle. And since the blood spot "J" is very close to the left edge of the road, it strongly suggests not only that the plaintiffs had fallen off their m/cycle at about that spot, upon colliding into the m/lorry, but also that the m/lorry was very close to the left edge of the road and on the correct side of the m/cycle, at the time of impact. As there were no broken pieces of glass, brake marks or scratch marks on the road, the proper inference as to where the impact occurred along the road must be drawn from the position of the blood spot ("J") and not from the position of the tyres of the m/cycle ("G" and "I") on the sketch plan. In the absence of any direct evidence to explain why the m/cycle appears to be almost at the apex of the sharp bend the proper inference, on a balance of probabilities, is that it came to rest there consequent upon it either being dragged there by the m/lorry after the collision near the blood spot, or alternatively, the force of the impact caused the lighter vehicle to be pushed by the heavier vehicle.

The learned Sessions Court judge has failed to give any consideration at all to the blood spot found at "J" on the sketch plan. She appears to be totally oblivious of the blood spot, for there was no mention of it at all in her grounds of judgment. If she had only considered the evidence of the blood spot found completely along the line of travel of the 1st plaintiff, together with the defendant's admission in cross-examination that there was a possibility that the lorry had encroached on to the 1st plaintiff's path when he negotiated the bend, (p. 32 Record of Appeal)

> Ada kemungkinan lori masuk ke jalan plaintif semasa saya ambil selekoh kanan.

and coupled with the further admission in cross-examination that he had not taken evasive action in front of him, and finally accident happened, (p. 33 Record of Appeal)

> Saya setuju semasa lihat motor dari hadapan saya tidak elak ke sebelah tepi. Saya setuju saya tidak tahu bagaimana kemalangan berlaku.

the learned Sessions Court judge would have come to the conclusion that the defendant was 100% liable.

The learned Sessions Court judge has failed to evaluate all the evidence before her and has therefore misdirected herself in law and fact that the defendant was only 50% to blame for the accident. The uncontroverted silent evidence – the blood spot – which the Session Court judge completely failed to consider and evaluate, points quite conclusively that the 1st plaintiff's version of how the accident happened ought to be accepted.

With regard to the plaintiffs' 5th ground of appeal, namely, that the learned Sessions Court judge had erred in law in not making an award in damages for loss of future earnings on the ground that the 1st plaintiff had not adduced evidence that he had been in good health before the accident, I rule that the Sessions Court judge has, indeed, erred in law and that the 1st plaintiff be, therefore, awarded the damages for loss of future earnings as assessed by the Sessions Court judge at RM1,125 per month. The number of years purchase shall be 16, as the 1st plaintiff was below 30 years at the time of the accident.

The requirement in law that it must be proved or admitted that the plaintiff was in good health but for the injury, under s. 28A(2)(c)(i) Civil Law Act 1956, is, in my opinion, satisfied when there is no challenge by the defendant either specifically in his pleadings, or in cross-examination of the plaintiff, as to the plaintiff's health but for the injuries sustained. In every accident case, where it has been established that the plaintiff has been gainfully employed immediately before the accident, there is always a presumption that the plaintiff was in good health and his claim for loss of future earnings is directly attributable to the injuries sustained from the accident and no other cause of ill health prior to the accident. In this case, there has been no suggestion at all that the 1st plaintiff was suffering from any form of ill health before the accident. Therefore, it must be deemed to be admitted that the plaintiff was in good health but for the injuries. None of the medical reports produced in this case have suggested that the 1st plaintiff suffered from any health impairment other than that consequent upon the injuries sustained in the accident.

The learned Sessions Court judge has wrongly invoked s. 28A(2)(c)(i) Civil Law Act 1956 and, thereby, imposed an unduly high burden of proof of good health to qualify for an award in damages for loss of earnings. She has failed to consider that good health had been impliedly admitted, in all the circumstances of this case.

The plaintiffs appeal is allowed with costs. The liability assessed at 50:50 is set aside and the defendant's liability is now assessed at 100%. The award in damages for loss of future earnings for the 1st plaintiff is allowed, as assessed by the Sessions Court judge at RM1,125 x 12 x 16.